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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
FIRST APPELLATE DISTRICT  
DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

JOHN LYNDON DEAN,

Defendant and Appellant.

A122262

(Marin County  
Super. Ct. No. SC158182A)

After a jury trial, John Lyndon Dean was convicted of battery with serious bodily injury and assault by means of force likely to cause great bodily injury. Defendant contends the trial court erred in allowing the victim to testify because her mental disability rendered her incompetent. Defendant also argues that this error and his trial counsel's failure to object to it deprived him of his constitutionally guaranteed rights to confrontation, a reliable verdict, and effective assistance of counsel. We find these contentions lack merit and affirm the judgment.

**I. BACKGROUND**

By information filed in the Marin County Superior Court, defendant was charged with battery with serious bodily injury (Pen. Code, § 243, subd. (d); count 1) and assault by means of force likely to cause great bodily injury (Pen. Code, § 245, subd. (a)(1); count 2). The information also alleged that the assault resulted in great bodily injury and was committed within a domestic relationship (Pen. Code, § 12022.7, subd. (e)).

## ***A. Prosecution Case***

### ***1. Witness Testimony***

On the evening of March 7, 2008, one of defendant's neighbors overheard defendant and the victim, Jennifer Reed, arguing on the porch of defendant's apartment in Novato. According to the neighbor's testimony and police report, defendant told Reed to "get off my porch" and then hit her in the face with the screen door. Another neighbor saw Reed sitting in the passenger seat of defendant's van and heard a sound like someone "violently hit" the side of the van. The neighbor overheard defendant tell Reed that he was taking her to the police and then saw them drive away.

Shortly after 7:00 a.m. the next morning, Ryan Hoog found Reed on the driveway to his father's large ranch in Nicasio. She was slumped over on the side of the road, her face and head were covered with mostly dried blood, her face was bruised and swollen, and the back of her shirt was soaked in blood.

When Deputy Sheriff Alisia Lellis of the Marin County Sheriff's Office arrived, Reed told her, "My boyfriend did this," and that her boyfriend's name was "JD." According to Lellis, Reed said defendant beat her with his hands and fist, and stabbed her. Reed told Lellis that the assault took place in her apartment and in defendant's van, and she provided the sheriff's office with a cell phone number that was tracked to defendant. Another officer testified that when he initially reported to the hospital where Reed had been taken he saw that she appeared to have written defendant's name on her arms.

During an interview several days later, Reed told Detective Sophia Winter of the Novato Police Department that she had a sexual relationship with defendant and they had been dating for approximately three weeks. Winter testified that an investigation of defendant's van turned up "several handwritten notes addressed to a person named JD from a person named Jenn."

During an interview on March 8, 2008, defendant told Officer Steven Cogan of the Novato Police Department that he had known Reed for three months prior to the incident. Defendant admitted to Cogan that Reed had been at his residence on the evening before

she was found in Nicasio. According to defendant's initial statement to Cogan, "she wanted to have sex with him, and he didn't want to have sex with her, and that they got into an argument, and she was trying to hit him, and he slapped her or hit her on the right side of her face." Defendant told Cogan he then "loaded up" Reed into his van and took her to the street where she lived.

Cogan testified that he searched defendant's van and found it had cardboard covering the side rear windows, the backseat had been removed, and it contained sleeping bags and a bag containing "sex toys," including some ties. At defendant's apartment, he found Reed's broken eyeglasses near the screen door. Cogan stated that he did not find blood or apparent signs of struggle in Reed's apartment, defendant's home, or in his van. He also reported that defendant had a small cut on his right hand and his knuckles were noticeably redder than on his left hand.

During a subsequent search of the Hoogs' driveway, Novato Police Sergeant Keith Heiden and Detective Jehan Amdjadi found a cigarette butt near where Reed had been located. Senior criminalist Amy Rojas of the California Department of Justice tested the cigarette butt and determined that only defendant's DNA was present on it.

## ***2. Victim Testimony***

Reed testified on direct examination that she had known defendant for a month prior to the attack, she considered him to have been her boyfriend, and they were sexually active together. On March 7, 2008, defendant offered to give her a ride home in his cab and then gave her speed. Defendant took Reed into her bedroom, tied her to the bed, and hit her multiple times in the face. She testified that he then threw her into his van and said, "I'm going to take you out to Bolinas. I'm going to leave you out there for death [*sic*]." Defendant then dumped Reed in a field where she remained all night until police officers arrived and picked her up the next morning. Reed claimed that she did not go to defendant's apartment.

On cross-examination, Reed testified that one of her previous boyfriends also beat her. She denied, however, making prior reports of rape and assault, and denied making

abuse allegations against her current boyfriend.<sup>1</sup> Reed said that the attack on March 7, 2008 occurred in her apartment and defendant's van, and she bled in both locations. She stated that defendant tried to strangle her with a necktie and used a knife on her head. She disagreed with defense counsel that police found her in Nicasio, rather than Bolinas. Reed again claimed she had never been to defendant's apartment. She also denied writing a note to defendant telling him that she knew where he lived.<sup>2</sup> Reed testified that she told police defendant stored speed in a secret compartment in his van.<sup>3</sup>

### ***3. Testimony Regarding Victim Competence***

Prior to trial, defendant filed a motion in limine objecting to any attempt by the prosecution to find Reed incompetent under Evidence Code section 701. Defendant argued that if the court determined Reed to be incompetent, the case should be dismissed. The court granted defendant's motion and no preliminary ruling was made on the issue of Reed's testimonial competence.

At trial, the prosecution presented several witnesses regarding Reed's mental status. Her psychologist, Dr. Telford Moore, testified that she suffers from moderate mental retardation, cognitive disorder, disruptive behavior disorder, and depression. He opined that, as a result of her mental disabilities, she has difficulty absorbing and retaining large amounts of information, making tasks such as responding to numerous questions potentially overwhelming.

Moore stated that although Reed at times says things that are inconsistent or out of context, he found no evidence of hallucinations and does not believe she suffers from a psychotic or thought disorder. The psychologist testified that he did not know Reed to intentionally lie, but instead believes that she merely makes misstatements based on

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<sup>1</sup> Detective Winter testified that she had previously investigated a domestic violence allegation that Reed had made against her boyfriend, David Allan.

<sup>2</sup> A note found inside defendant's van, which Winter confirmed was written in handwriting similar to Reed's written report of the attack, said that "a little birdie told me where you lived."

<sup>3</sup> No drugs or hidden compartments were found in defendant's van.

“whatever sounds right at the time.” He also stated that Reed does not know these misstatements are objectively untrue, “[a]t least half the time.”

Reed’s social services coordinator, Crystal Hayes, testified that Reed has problems “on both sides of . . . receptive communication.” She stated that Reed has difficulties understanding conversations, and that when Hayes says something to Reed “she’s not going to get from it often what I actually said.”

Raymond Lemis, Reed’s direct care provider, testified that “she knows the difference between right and wrong. . . . [W]hen she does tell me something that’s untrue, she pulls way back.”

### ***B. Defense Case***

Defendant presented several witnesses who testified as to multiple occasions where Reed made false accusations of rape and assault, and later recanted those allegations.

Reed was recalled as a defense witness. On direct examination she testified that she smokes cigarettes and occasionally “bummed them” from other people, but denied ever taking any from defendant.<sup>4</sup> She indicated that defendant’s roommate gave her his address, and that defendant himself gave her his cell phone number.<sup>5</sup>

Defendant was called as a defense witness and testified to generally the same details of the evening of March 7, 2008 as he had previously reported to investigating officers. On cross-examination, defendant admitted that he used ties during sex.

### ***C. Verdict, Judgment, and Appeal***

The jury convicted defendant of both counts, and found true the allegation, as to count two, that he inflicted great bodily injury. The trial court sentenced defendant to a total prison term of seven years.

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<sup>4</sup> Defendant testified that he is a smoker and leaves cigarette butts in an ashtray in his van.

<sup>5</sup> Defendant testified that he had never given Reed his cell phone number or address, and that she must have gotten that information from a room-for-rent advertisement with his information on it that he posted in the lobby of the cab company.

## II. DISCUSSION

Defendant contends that Reed was incompetent to testify because her mental disability prevented her from understanding and complying with the duty of a witness to tell the truth. Defendant further contends that his conviction must be reversed because the admission of Reed's testimony deprived him of his state and federal constitutional rights to (1) confrontation, (2) a reliable verdict, and (3) effective assistance of counsel.

### A. *Victim's Testimonial Competence*

In order to preserve for appeal a claim of testimonial incompetence, a party must object on this ground at trial. (*People v. Zambrano* (2007) 41 Cal.4th 1082, 1139, disapproved on another ground in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.) "Defendant may not circumvent this objection requirement by claiming that the trial court should have inquired into the witness's qualifications on its own." (*People v. Cudjo* (1993) 6 Cal.4th 585, 622, fn. omitted.) Here, defendant did not preserve this issue for appeal by objecting to Reed's competency at any stage of the trial. The issue is therefore waived. Yet even if this claim were not forfeited, it would still fail on the merits.

The general rule relating to a witness's competency to testify is: "Except as otherwise provided by statute, every person . . . is qualified to be a witness and no person is disqualified to testify to any matter." (Evid. Code, § 700.) " 'A person is disqualified as a witness only if he or she is "[i]ncapable of expressing himself or herself [understandably] concerning the [testimonial] matter" (*id.*, § 701 subd. (a)(1) . . . ), or is "[i]ncapable of understanding the duty of a witness to tell the truth" (*id.*, . . . subd. (a)(2) . . . ).' " (*People v. Zambrano, supra*, 41 Cal.4th at p. 1140.)

It is well settled that the burden of proof is on the party who challenges a witness's mental capacity to testify, and a trial court's determination on the matter will be upheld in the absence of a clear abuse of discretion. (*People v. Anderson* (2001) 25 Cal.4th 543, 573; see also *People v. Mincey* (1992) 2 Cal.4th 408, 444 (*Mincey*).) Additionally, "[t]he challenging party must establish a witness's incompetency by a preponderance of the evidence." (*People v. Lewis* (2001) 26 Cal.4th 334, 360; *People v. Farley* (1979) 90 Cal.App.3d 851, 869.) Because there is no indication that Reed's testimony was

incomprehensible, defendant must argue she was incapable of understanding the duty to testify truthfully.

The record contains little evidence that Reed does not have the intellectual capacity to understand that she was obliged to tell the truth. Rather, it seems to indicate that her understanding of that duty, while not necessarily steadfast or reliable, is enough to satisfy competency requirements. (See *People v. Farley*, *supra*, 90 Cal.App.3d at p. 869.) In particular, there is scant evidence in the record indicating that Reed is fundamentally incapable of differentiating fact from fiction. Rather, Reed became confused and unintentionally made misstatements that are essentially no different from the misstatements, misconceptions, and errors that all witnesses are prone to. However, with Reed, these infirmities happen to a greater degree and with greater frequency. That, in and of itself, is not enough to disqualify Reed as a witness, but merely affects her credibility.

The only evidence to the contrary is testimony from Reed's psychologist that when she makes misstatements she does not know they are untrue "[a]t least half the time." A commonsense reading of this statement would seem to indicate that the other half of the time, when Reed says things that are objectively untrue, she knows them for lies. Further, Reed's caretaker testified that she knows the difference between right and wrong, and knows when she intentionally lies. Although defendant attempts to trivialize this point, it is an integral part of the analysis of a witness's competency. In affirming a juvenile court's finding that a mentally disabled minor was competent to testify, the court in *In re S.C.* (2006) 138 Cal.App.4th 396 stated, "the minor, while developmentally disabled, . . . knew the difference between telling a truth and a lie . . . ." (*Id.* at p. 421.)

*People v. Lyons* (1992) 10 Cal.App.4th 837 (*Lyons*) is the only case cited by both parties in which a witness was found incompetent to testify on the grounds of incapacity to understand the duty to testify truthfully. There, the court determined that the witness was so delusional, and her testimony so contradictory and fantastic, that admitting it at trial was error. (*Id.* at p. 844.) The witness's testimony included claims that the defendant had sexually assaulted her in an imaginary third orifice and murdered two of

her husbands, the second by blowing up the plane on which he was flying. (*Id.* at p. 843.) It was also revealed that she suffered from multiple personality disorder and the trial court had been unable to determine which of the different personalities was testifying. (*Ibid.*)

*Lyons* is clearly distinguishable. Reed's psychologist testified that she does not suffer from any psychotic disorders and is not prone to thoughts that lie "outside the normal range of reality." Her testimony provided an account of the attack that was neither impossible, nor improbable. Defendant argues that the lack of blood in his van or Reed's apartment renders her account of the attack unbelievable. However, defendant could have replaced the cardboard and any blood-stained blankets with new cardboard and sleeping bags before the van was searched by police the following day. Alternatively, Reed could have been mistaken about where she bled without rendering her testimony wholly unbelievable. Defendant also argues that it is improbable that defendant would leave Reed to be found with his name written on her arms. First, the record does not indicate that the writings on Reed's arms were there before she was attacked. Second, even if they had been, that an assailant might be careless in the commission of a violent crime is not improbable. In sum, Reed's testimony falls well short of the threshold for incompetency.

The jury was entitled to consider whether Reed's testimony was credible. Accordingly, had the objection been raised, the trial court would not have abused its discretion in admitting the testimony.

### **B. *Right of Confrontation***

The Sixth Amendment to the federal Constitution and section 15 of article I of the California Constitution give an accused the right to confront witnesses who would testify against him or her. (*People v. Cudjo, supra*, 6 Cal.4th at p. 622.) "Although the right of confrontation requires that an accused receive 'an adequate opportunity to cross-examine adverse witnesses' [citation], it does not protect against testimony that is 'marred by forgetfulness, confusion, or evasion.'" ' ' (*Ibid.*, quoting *Delaware v. Fensterer* (1985) 474 U.S. 15, 21.)



Defendant contends that Reed's mental disability rendered her immune from cross-examination, thus denying him his right of confrontation. First and foremost, as we have laid out above, the record does not support the contention that Reed was incompetent to testify. At the same time, defendant had and utilized ample opportunity to confront her. There was a sufficient confluence of lucid testimony and corroborating evidence, such that "[w]e are satisfied that the process of examination and cross-examination gave the jury an adequate basis on which to evaluate the truth of the witness's testimony. The Sixth Amendment's confrontation clause requires no more." (*People v. Cudjo*, *supra*, 6 Cal.4th at p. 622.)

### **C. Right to Reliable Verdict**

Also without merit is defendant's challenge under the due process clause of the Fourteenth Amendment of the federal Constitution and section 15 of article I of the California Constitution. "Both the federal and the California Constitutions require certain procedure to ensure reliability in the fact-finding process." (*Mincey*, *supra*, 2 Cal.4th at p. 445.) As the court in *Mincey* remarked in rejecting a similar claim, "Here, defendant was fully afforded such protections. He was given an opportunity to be heard and to cross-examine in a judicial forum." (*Ibid.*) Defendant's argument that his verdict is unconstitutional because it was founded on unreliable evidence fails alongside his claim that Reed was incompetent to testify.

### **D. Ineffective Assistance of Counsel**

In claiming ineffective assistance of counsel, defendant has the burden of showing "(1) counsel's performance was deficient, falling below an objective standard of reasonableness under prevailing professional norms; and (2) the deficient performance resulted in prejudice." (*People v. Montoya* (2007) 149 Cal.App.4th 1139, 1146–1147, citing *Strickland v. Washington* (1984) 466 U.S. 668, 688 (*Strickland*).) In satisfying the first prong of this test, defendant must show that counsel's actions were not only deficient, but also "cannot be explained on the basis of any knowledgeable choice of tactics." (*People v. Montoya*, at p. 1147.)

Defendant argues that his trial counsel's only reason for rejecting the competence issue was her failure to perceive its existence. However, the record contains a straightforward reason for her failure to object to Reed's competency. Counsel, in pretrial motions regarding Reed's testimony, stated that, "[Reed's] credibility is the primary issue in this case . . . [¶] . . . there will be inquiry into her truthfulness. . . . [¶] . . . Defendant objects to any attempt by the People to find [Reed] a person coming under Evidence Code Section 701. This entire case depends on [Reed] being a qualified witness."

Counsel explained that her intention was to demonstrate that Reed lied to officers in the past and provided various locations for her attack, none of which could be supported by evidence uncovered during the investigation. Perhaps trial counsel was seeking to neutralize evidence presented from other witnesses by showing that nearly all of it stemmed from the investigation of unbelievable claims made by the victim, or counsel believed that attacking her credibility would be more successful than challenging her competency. Regardless, she sought to present the issue of Reed's credibility to the jury and this is not an inherently unreasonable tactical choice. Generally speaking, "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." (*Strickland, supra*, 466 U.S. at p. 689.) Here, defendant has not overcome that presumption.

Furthermore, defendant's argument fails the second prong of the *Strickland* test because trial counsel's failure to object did not prejudice defendant. Simply put, where "there was no sound legal basis for objection, counsel's failure to object to the admission of the evidence cannot establish ineffective assistance." (*People v. Cudjo, supra*, 6 Cal.4th at p. 616.) Reed was competent to testify and any objection on that issue would undoubtedly have been denied. Defendant's claim of ineffective assistance of counsel lacks merit.

### III. DISPOSITION

The judgment is affirmed.

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Margulies, J.

We concur:

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Marchiano, P.J.

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Graham, J.\*

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\* Retired judge of the Marin County Superior Court assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.